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SEP 21 1923

WM. R. STANLEY

Supreme Court of the United States

122

NO. ~~112~~ OCTOBER TERM, 1923.

HELEN C. FRICK, Petitioner,

VS.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

A Writ of Error has been allowed in this case by the Chief Justice of the Supreme Court of Pennsylvania and docketed at this number and Term. This petition for certiorari is filed in the case to meet the possible contingency that the questions involved cannot be heard on writ of error.

✓
✓ GEORGE WHARTON PEPPER,
GEORGE B. GORDON,
Attorneys for Petitioner.

Notice of Application for Writ of Certiorari.

Notice is hereby given that the above named petitioner will, on Monday, October 1st, 1923, at the opening of the Court, or as soon thereafter as counsel can be heard, present her verified petition, which has been filed in the office of the Clerk of the Court, and a copy of which is hereto annexed, together with copy of the entire record in this cause, to the Supreme Court of the United States, at the Court rooms in the Capitol in the City of Washington, D. C., and will, at such time and place, move the Court to issue its writ of certiorari to the Supreme Court of the State of Pennsylvania to review the decision of said Court rendered in the above named cause.

GEORGE WHARTON PEPPER,
GEORGE B. GORDON,

Attorneys for Petitioner.

Dated September 17, 1923.

To:

COMMONWEALTH OF PENNSYLVANIA,
HON. GEORGE W. WOODRUFF,
Attorney General.

HON. DAVID A. REED,

Attorneys for the Commonwealth of
Pennsylvania.

THE HISTORY OF THE CITY OF BOSTON

FROM THE FIRST SETTLEMENT IN 1630
TO THE PRESENT TIME
BY
JOSEPH NEALE
OF THE BOSTON BAR
AND
JOHN W. L. GARDNER
OF THE BOSTON BAR
PUBLISHED BY
J. B. LEECH, 15 NASSAU ST. N. Y.
1888

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Supreme Court of the United States

NO. 442 OCTOBER TERM, 1923.

HELEN C. FRICK, Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

Petition for Writ of Certiorari to Review a Decision of the Supreme Court of Pennsylvania.

*To the Honorable The Supreme Court of the United
States:*

The petition of Helen C. Frick respectfully shows:

1. In the matter of the estate of Henry C. Frick originally in the Orphans' Court of Allegheny County, Pennsylvania, an adjudication was made as to the transfer inheritance (estate) taxes due the State of Pennsylvania from the estate of Henry Clay Frick, who was a citizen of Pennsylvania and domiciled there at the time of his death. Your petitioner is a daughter of Mr. Frick, has her domicile in Pittsburgh, Pennsylvania, and is one of the executors of and a residu-

ary legatee under his will. The executors of Mr. Frick's will paid voluntarily to the Commonwealth of Pennsylvania the sum of \$1,978,949.71, which they claimed was the amount payable as a transfer inheritance tax to the State. The Commonwealth of Pennsylvania claimed that it was entitled to the additional sum of \$1,188,248.16. About one-half of this additional amount was arrived at by adding to the taxable value of the estate, as returned by the executors, the value of tangible articles of personal property (that is, Mr. Frick's art collection and household furniture), which were located at the time of his death in his residences in the States of New York and Massachusetts and upon which inheritance taxes had been paid to the States of New York and Massachusetts, respectively, to the extent that they were taxable under the estate tax laws of those states. Your petitioner claimed that it was beyond the power of the State of Pennsylvania to levy any inheritance tax upon those articles and that said tax constituted a violation of the Fourteenth Amendment. The remainder of the increased amount of tax was caused by the disallowance by the Orphans' Court of Allegheny County (in ascertaining the taxable value of the residuary estate) of certain deductions claimed by the executors, which consisted of estate and inheritance taxes paid to the United States and some eighteen of the states constituting the United States and to the Province of Quebec (upon real estate located in those states and shares of stock of corporations incorporated under the laws of those states). Your petitioner claimed that the failure to allow these deductions in ascertaining the taxable value of the residuary estate

was a violation of the Constitution and laws of the United States.

Petitioner prosecuted an appeal to the Supreme Court of Pennsylvania and said court decided the questions adversely to petitioner's contention. There are seven justices of the Supreme Court of Pennsylvania, of whom five participated in the argument and the decision. One justice was ill and one was disqualified for the reason that he had been Attorney General of the State and counsel for the Commonwealth at the the time this controversy originated. The opinion of the court was rendered by Justice Simpson and concurred in by Chief Justice Von Moschzisker and Justices Walling and Kephart. Justice Frazer filed a dissenting opinion. Your petitioner made an application to the Supreme Court of Pennsylvania for the allowance of a writ of error from this court. The Supreme Court of Pennsylvania held that this was a proper case for the allowance of a writ of error and the writ was allowed by Robert Von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania. The writ of error was duly sued out and has been filed in this court and docketed at this number and term. While petitioner has been advised by her counsel that in their opinion this is a case which can properly be brought to this court by a writ of error, she has also been informed that there is possibly some doubt as to whether the correct remedy is not by *certiorari*; and therefore your petitioner seeks to have this court review the decision hereinbefore referred to on *certiorari* in case it should be held that the case is not properly here upon a writ of error.

2. The first question involved in this litigation is whether the State of Pennsylvania did not exceed its power and jurisdiction when it passed this statute which as applicable to this case provides that there shall be included in the taxable value of the estate tangible articles of personal property located at the time of Mr. Frick's death in his two residences in New York City, New York, and Pride's Crossing, Massachusetts, and whether, in collecting an inheritance tax upon the value of those articles, it did not violate the due process clause of the Constitution of the United States.

3. Petitioner's next contention is that, when the Commonwealth of Pennsylvania, in ascertaining the tax which must be borne by the residuary legatees, refused to allow as a deduction from the taxable value of the estate the estate tax levied by the United States Government which had been paid to the amount of \$6,338,898.68, it violated clause 1 of section 8 of Article 1 of the Constitution of the United States in that it interfered with the power of Congress to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States and also clause 2 of Article VI of the Constitution of the United States in that it denied that the said Constitution and the laws of the United States made in pursuance, to wit, among others, sections 400 to 410, inclusive, of an Act of Congress of the United States, entitled "An act to provide revenue and for other purposes," approved February 24, 1919 (40 Stat., pp. 1096-1101) and section 3467 of the United States Revised Statutes, are the supreme law of the

land and that the judges in every state are bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding, and also clause 1 of the Fourteenth Article of Amendment to the Constitution of the United States in that it deprived your petitioner of property without due process of law and also denied to her the equal protection of the law.

4. Petitioner's next contention is that so much of the judgment of the Orphans' Court of Allegheny County, Pennsylvania, and the Supreme Court of Pennsylvania as directs the payment of the tax on an estimated value of the residuary estate without deducting from the estimated gross estate the inheritance taxes paid to other states on the transfer of real estate in other states will deprive petitioner of her property without due process of law in violation of section 1 of the Fourteenth Article of Amendment to the Constitution of the United States and also of the equal protection of the laws in violation of section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

5. Petitioner's next contention is that so much of the tax authorized and directed to be paid by the Orphans' Court of Allegheny County and the Supreme Court of Pennsylvania as includes a tax on the estimated value of the estate, without a deduction of inheritance taxes paid other states on the transfers of shares of stocks of corporations incorporated under the laws of those states, will deprive your petitioner of her property without due process of law and will deprive her of

the equal protection of the laws in violation of section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

6. Your petitioner's next contention is that, in so far as the decree of the Orphans' Court of Allegheny County and of the Supreme Court of Pennsylvania distributes to the Commonwealth of Pennsylvania a sum of money which includes a tax on the estimated value of the estate without a deduction of the Pennsylvania inheritance tax from the estimated value of the gross estate the effect of such action is to increase the taxable value of the residuary estate, and your petitioner, as one of the residuary legatees is deprived of her property and the said tax is invalid on the ground of its being repugnant to section 1 of the Fourteenth Article of amendment to the Constitution of the United States in that it deprives your petitioner of property without due process of law and also denies to her the equal protection of the laws.

7. The facts upon which this controversy arises are as follows: Mr. Henry Clay Frick died in the City of New York on the 2nd day of December, 1919. He left a last will and testament dated the 24th day of June, 1915, probated on December 6, 1919, in the office of the Register of Wills of Allegheny County and of record in Will Book Volume 160, page 6. This will is in writing. It was subscribed at the end by Mr. Frick in the City of Pittsburgh, Pennsylvania. It was attested by the written signatures of three citizens of Pittsburgh and was in Pittsburgh at the time of his death. Mr. Frick was born in the State of Pennsylvania and he was continuously domiciled in said State from his birth until his death.

Mr. Frick, at the time of his death, had three houses. One, known as Clayton, is located in the City of Pittsburgh, Pennsylvania. It was acquired by him soon after his marriage and given (conveyed) by him shortly thereafter to his wife. This was his legal domicile, so denominated by him when he registered every year as a voter in the voting precinct and ward of the City of Pittsburgh in which the house is situated. Another of his residences was a house at Pride's Crossing in the State of Massachusetts. By his will he devised to his wife a life estate in this property and the remainder to his daughter, your petitioner. He bequeathed to his wife all the tangible personal property (furniture, pictures, etc.) located in and about this residence. The taxing authorities of the State of Pennsylvania did not attempt to include the value of this real estate in Mr. Frick's taxable property, but they included the value of the tangible personal property located there at a valuation of \$325,534.25 and levied a transfer inheritance estate tax thereon. This levy has been sustained by the Orphans' Court of Allegheny County, Pennsylvania, and the Supreme Court of Pennsylvania, the court of last resort.

Mr. Frick also owned another residence on Fifth Avenue in the City of New York, the land and buildings being of the value of upwards of \$3,000,000. This residence he devised to a charitable corporation of the State of New York known as "The Frick Collection," but he gave his wife the right or license to use it "so long as she should occupy the same as one of her residences." The State of Pennsylvania has not attempted

to tax this real estate, although the Act, the constitutionality of which petitioner is here attacking, directs such a levy to be made. Contained in this residence was Mr. Frick's collection of paintings, antique furniture and other objects of art. These he bequeathed to said corporation of the State of New York known as "The Frick Collection," with the mandatory provision that the collection should always be retained and maintained in said residence for the use and benefit of all persons whomsoever. This residence also contained certain other furniture, household supplies, etc., which were not a part of the Frick Collection. These Mr. Frick bequeathed to his wife. The State of Pennsylvania valued the articles of personal property comprising "The Frick Collection" at \$13,132,391, and valued the rest of the tangible personal property (furniture, etc.) that was in this residence and garage adjacent thereto at \$77,818.75. The Commonwealth included these valuations in its estimate of the taxable value of the estate and levied a tax thereon. Your petitioner contends that these articles of tangible personal property were beyond the dominion of the State of Pennsylvania, and that the Pennsylvania Act, in so far as it authorized and directed a tax to be levied on them, is a violation of the Constitution of the United States, has the effect of reducing the residuary estate by upwards of \$600,000, and deprives petitioner, as one of the residuary legatees, entitled to thirteen per cent,—the rest went to charity—of her property.

The balance of the tax in controversy in this case, amounting to upwards of \$500,000, was caused by the

refusal of the State of Pennsylvania (in accordance with the mandate of the statute as it was construed by the Orphans' Court of Allegheny County and the Supreme Court of Pennsylvania) to deduct from the total taxable value of the estate before levying the tax four items: (a) estate taxes paid to the United States which were a paramount lien upon the whole estate; (b) transfer inheritance estate taxes paid to other states upon real estate located in those other states; (c) transfer inheritance taxes paid to other states and to the Dominion of Canada upon shares of capital stock of corporations organized under the laws of those states and the Dominion of Canada, which were a paramount lien upon those shares and where the shares could not be reduced to possession by the executors or over which no act of dominion could be exercised by them until such foreign taxes were paid, and (d) the inheritance taxes imposed by the State of Pennsylvania upon the general and specific devises, which taxes, so paid, amounted to \$1,925,247.61 (which will be increased if this decision of the Supreme Court of Pennsylvania stands by the additional amount of \$1,200,000).

Some of these taxes by the law and all of them by the terms of Mr. Frick's will are thrown upon the residuary estate.

Your petitioner contends that all of the additional Pennsylvania estate taxes were imposed in violation of her rights under the Constitution of the United States:

8. Therefore:

THE FUNDAMENTAL QUESTIONS INVOLVED
IN THE CASE ARE

(1) In so far as the Pennsylvania Inheritance Tax Law of 1919 and the adjudication made in this case in conformity with it impose a transfer inheritance tax on tangible articles of personal property located at the time of their owner's death in Massachusetts and New York, has not the Commonwealth exceeded its power, and do not the statute and the adjudication violate the Constitution of the United States?

The tangibles in Massachusetts were located at the testator's summer home at Pride's Crossing. They were given by the will to Mrs. Frick and consisted of paintings, furniture, household stores, farm implements, etc. The tangibles in New York were located at the testator's New York house. They were given by the will in part to Mrs. Frick and in part to the Frick Collection, a charitable corporation of the State of New York, which the testator by his will directed to be formed for the purpose of receiving them, and to which he devised the New York house. The tangibles given to the corporation consisted of decedent's paintings, antique furniture and other objects of art which were contained in the New York house and were bequeathed with the provision that they must remain in that build-

ing forever. The tangibles given to Mrs. Frick consisted of the contents of the New York house, other than the art collection, such as household stores, etc., and the contents of the garage, such as automobiles, tools, etc.

(2) In so far as the Pennsylvania Inheritance Tax Law of 1919 and the adjudication in this case made in conformity with it imposes a transfer inheritance tax to be paid by the residuary legatees and devisees without a deduction from the gross estate of the amounts paid (a) to the United States as an estate tax; (b) to other states as taxes on real estate; (c) to other states as taxes on the transfer of shares of stock of corporations of those states; and (d) to the Commonwealth of Pennsylvania as inheritance taxes on general and specific legacies, does not said act exceed the power of the Commonwealth of Pennsylvania and violate the Constitution of the United States?

Petitioner contended in the Pennsylvania courts that the Pennsylvania Inheritance Tax Law of 1919, under which this tax was levied, imposes a succession tax which applies only to the bequests received by the various beneficiaries. The Supreme Court of Pennsylvania has decided to the contrary; that is, it has decided that this act imposes an estate tax and not a succession tax. Petitioner concedes that the decision of the Pennsylvania courts upon the meaning of the statute is not reviewable here. The Pennsylvania inheritance tax act, as construed by the Pennsylvania courts, imposed an estate tax upon the whole property, real and personal, of which the decedent died seized, wherever situate, and allowed deductions to be made only for

debts of the decedent and administration expenses. The tax imposed by the act, however, is not uniform, but is classified according to the relationship of the beneficiaries to the deceased. Under this statute, the bequests to Mr. Frick's wife and his lineal descendants were subject to a two per cent. tax. All other devises and bequests were subject to a five per cent. tax. The Pennsylvania act contains no exemption for charities.

In order to assess the tax at the different rates, admittedly a difficult if not impossible thing to accomplish, where the tax is levied upon the decedent's whole estate and not upon the gifts to the beneficiaries, the taxing authorities adopted the following method, which the Supreme Court of Pennsylvania by affirming the decision of the Orphans' Court of Allegheny County has sustained.

This is the way they made their levy. They first took the values of all the real estate in Pennsylvania specifically devised (except the devise to the City of Pittsburgh for a park which was not taxable) and of all the personal property specifically bequeathed, wherever situate, and calculated a tax on them at the rate of either two or five per cent. They then took from the will the amounts of the general legacies and assessed a tax on those at the proper rates. This brought the calculation to a point where they had found the value of the real estate in Pennsylvania and all the other property disposed of by the will, except the residuary estate, to be \$55,783,794. This it will be understood is the sum of the general and specific bequests and devises (excluding real estate outside of Pennsylvania). They then fixed the value of the entire estate,

excluding real estate outside of Pennsylvania, at \$89,675,098.45. From this total valuation they subtracted the sum of the specific devises and bequests and reached a residue of \$33,891,304.45. From this they deducted the estimated administration expenses and debts of the decedent amounting to \$9,187,177.90, leaving an estimated balance of \$24,704,126.55, which the Orphans' Court of Allegheny County has christened "the net residuary estate." The taxing authorities then proceeded to tax thirteen-hundredths of this so-called net residuary estate at two per cent. because it is bequeathed to your petitioner, who is a daughter of the decedent, and eighty-seven-hundredths at five per cent. because under the will it goes to various charities. These two sums they added to the tax on the specific and general devises and legacies, which gives an aggregate amount of \$3,064,107.85. Deducting \$1,978,949.71 previously paid by the executors on account, and adding \$103,090.02 interest, they arrived at a total unpaid tax claim of \$1,188,248.16. This is the amount for which the Orphans' Court of Allegheny County entered judgment. The Supreme Court of Pennsylvania on appeal by the Commonwealth added \$100,000 (and interest thereon) to this amount, being a tax of five per cent. on what is known as the Park Endowment Fund of \$2,000,000, which the court below had found was not taxable.

The actual net residuary estate is not this fictitious amount of \$24,704,126.55 arrived at as shown above. There is no such amount of money in the residuary estate, and the residuary legatees will never get it.

The amount of money actually in the residuary estate is this estimated amount less \$6,338,898.68 paid to the United States as Federal inheritance taxes, less \$1,084,459.42 paid to other states and countries as taxes, less \$1,978,949.71 paid to the Commonwealth of Pennsylvania as inheritance taxes, that is to say, less a total sum of \$9,402,307.81. So the actual residuary estate now in the hands of the executors is only \$15,301,818.74. Moreover, if this decision of the Supreme Court of Pennsylvania stands, the residuary estate will be still further reduced by about \$1,300,000, additional Pennsylvania taxes that will have to be paid; and, if the Commissioner of Internal Revenue is successful in the contention he is making for additional United States estate tax, it will be reduced by the further sum of \$3,100,000. This will bring the real value of the residuary estate down to about \$10,901,818.74. So that the actual net residuary estate, which it may be assumed the residuary legatees will receive, if it is not still further depleted by taxes, is not twenty-five million dollars, but between eleven and fifteen million dollars.

Petitioner avers that she is deprived of her property without due process of law when, under the mandate of the Pennsylvania statute as construed by the court, she is compelled to pay an inheritance tax figured upon a residuary estate, arbitrarily assumed or ordered or decreed to be twenty-five million dollars, but which, in point of fact, is only somewhere between eleven and fifteen million dollars.

9. While your petitioner has been advised by counsel that the writ of error which has been allowed

in this case is her proper remedy under the decisions of this court (see *Eureka Pipe Line Company vs. Hallanan*, 257 U. S., 265; *United Fuel Gas Company vs. Hallanan*, 257 U. S., 277; *Dahnke-Walker Milling Company vs. Bondurant*, 257 U. S., 282), if the court should be of the opinion that the questions involved in this case cannot properly be raised upon a writ of error, then petitioner respectfully submits that a writ of *certiorari* should be granted in this case for the following reasons:

(a) Because the decision of the highest court of the State of Pennsylvania involves federal questions which were clearly raised in every court and at all stages of the proceedings and were definitely decided and passed upon adversely to petitioner's contention by the opinion and decree of the highest court of the state, to wit, the Supreme Court of Pennsylvania;

(b) The federal questions involved are questions of general and great importance and have never been decided by this court;

(c) There is a conflict between the decisions of the courts of last resort of various states as to whether or not the state in which a decedent was domiciled at the time of his death may lawfully levy an estate or succession tax upon tangible articles of personal property situate in some other state. This question, which depends upon the United States Constitution, has never been decided by any federal court.

(d) The intense pressure for money to use for governmental purposes is felt by each of the states of the Union, as well as by the government of the United States. In response to this pressure, several states are

developing a tendency to reach out beyond their limits and subject to taxation, for their own purposes, property which all will admit is subject to taxation by the state of its situs. Such a situation tends to chaos. The present situation is that inheritance taxes are being levied by the federal government, by the state wherein the decedent was domiciled, by the state in which his real estate was located, by the state in which his tangible personal property was located, by the state where the corporation in which he owned stock was domiciled, by the state in which his debtor was domiciled, by the state in which some railroad corporation domiciled in some other state has a line of tracks, and so on indefinitely. There should be an authoritative decision of this court as to whether or not the state of the domicile can levy an estate tax on the furniture in a summer residence which the decedent owned in some other state. That is one of the questions involved in this case. The more important one as to the money involved is, Can Pennsylvania levy an estate tax on Mr. Frick's great art collection which is located in New York and which can never be removed therefrom or brought into Pennsylvania?

(e) There is a conflict between the decisions of the States of Pennsylvania and New York as to the construction of a New York statute.

The Supreme Court of Pennsylvania in this case says that the New York statute which limits the proportion of the estate which the decedent may give to charity (this is a vital question involved in the present controversy bearing upon the point whether the be-

quest known as The Frick Collection passed under Mr. Frick's will or whether it passed under the release or assignment executed by his widow and children after his death) does not apply to property in New York belonging to a Pennsylvania citizen. (See Justice Simpson's opinion (page 38 of this book), beginning with the sentence, "These (New York statutes) relate, however, only to wills of testators there domiciled * * *"; whereas, the Court of Appeals of the State of New York has decided that the statute applies to property in the State of New York, of which a decedent, who was a citizen of another state, died seized: *Decker vs. Vreeland*, 220 N. Y., 326.

(f) It is submitted that the controlling reason given by the Supreme Court of Pennsylvania for sustaining the constitutionality of this act, by which the State of Pennsylvania levied this tax on tangible articles of personal property located outside the state (which act requires the levying of an inheritance tax upon all property, real and personal, wherever situate, which belonged to any person domiciled in Pennsylvania), is unsound. The reason advanced by the court is that, because "the property being distributed on this proceeding is all in this state; appellants are our citizens and duly appeared and contested the claim of the Commonwealth, * * *," and as the court has jurisdiction over the person who raises the question (that is your petitioner, one of the residuary legatees, who is a citizen of Pennsylvania), and the decedent, the State having jurisdiction over both—the decedent having been and appellants being now domiciled in the State, and the latter appearing to the action, all the

property now being distributed being within the State and a valid state statute lawfully imposing the tax the United States Constitution has no bearing upon the case. (See Justice Simpson's opinion, this book, pages 30 and 31.)

Your petitioner is entitled to thirteen-hundredths of the residuary estate; the rest of the residuary estate goes to charity. Under the construction placed upon this act by the Pennsylvania Supreme Court to wit, that it is an estate tax, as well as under the provisions of Mr. Frick's will, the burden of the whole of these inheritance taxes is cast upon the residuary legatees. Fifty-three per cent. of the residuary estate goes to Princeton University, Harvard College, Massachusetts Institute of Technology and the Society of the Lying-in Hospital of the City of New York, none of which institutions are domiciled in Pennsylvania. The right of the State of Pennsylvania to impose the tax cannot be any different where the question is raised by petitioner, who is a citizen of Pennsylvania, from what it would be if it had been raised by Princeton University, a citizen of New Jersey. Besides this, the question was also raised by the executors who represent all the residuary legatees, resident and nonresident.

In *Koch's Estate*, 4 Rawle 268, the Supreme Court of Pennsylvania decided that the administrator could prosecute an appeal from a decree of distribution affecting the interests of legatees residing abroad.

(g) In ascertaining the value of the estate for the purpose of imposing a transfer inheritance *estate*

tax by the State of decedent's domicile, must there not under the Constitution and laws of the United States be deducted (1) the inheritance tax which the executors were compelled to pay foreign states under whose laws corporations in which decedent owned stock were incorporated, before said shares of stock could be reduced to possession by the executors; (2) the estate tax levied by the United States under the Acts of Congress; (3) the inheritance tax paid foreign states upon real estate located in such foreign states; (4) the inheritance *estate* tax levied by the State of Pennsylvania upon the general and specific legacies and devises. All these are questions of general importance and none of them have ever been decided by this court.

Wherefore, your petitioner respectfully prays that, if in the opinion of this Honorable Court a writ of error does not lie in this case, a writ of *certiorari* may issue out of it under the seal of this court, directed to the Supreme Court of Pennsylvania, commanding the said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings in said Supreme Court of Pennsylvania in this case, to the end that the case may be reviewed and determined in this court as provided in section 240 of the Act of Congress designated as the Judicial Code, and the said decree of the said Supreme Court of Pennsylvania in this case and every part thereof may be reviewed by this Honorable Court and the decree of the Supreme Court of Pennsylvania may be reversed and the decision and

decree of the Orphans' Court of Allegheny County may also be reversed.

And your petitioner will ever pray.

HELEN C. FRICK,

Petitioner,

By

GEORGE WHARTON PEPPER,

GEORGE B. GORDON,

Her Attorneys.

State of } ss:
County of..... }

Helen C. Frick, being duly sworn, says that she has read the foregoing petition and knows the contents thereof and that the same is true as she is advised and believes.

.....
Sworn to and subscribed before me, this day
of, 1923.
.....

**Opinion of Majority of the Supreme
Court of Pennsylvania.**

IN THE SUPREME COURT OF PENNSYLVANIA
FOR THE WESTERN DISTRICT

ESTATE OF HENRY C. FRICK, Deceased.

Appeals of THE COMMONWEALTH OF PENNSYLVANIA.	}	Nos. 39 and 40 October Term, 1923.
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Appeals of HELEN C. FRICK, a residuary legatee.	}	Nos. 42 and 44. October Term, 1923.
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Appeals of ADELAIDE H. C. FRICK, HELEN C. FRICK, CHILDS FRICK, HENRY C. McELDOWNEY and WILLIAM WATSON SMITH, Ex- ecutors of the last will and testament of HENRY C. FRICK, deceased, and HELEN C. FRICK, a residuary legatee.	}	Nos. 43 and 45. October Term, 1923.
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Six appeals from Decrees of the Orphans' Court of Alle-
gheny County, as of December Term, 1920, No.
476, and of March Term, 1922, No. 171.

OPINION OF THE COURT.

SIMPSON, J.

We are asked by these six appeals to review the action of the court below in determining the amount of inheritance tax due by the estate of Henry C. Frick, deceased, to this Commonwealth, of which he was a resident, and in which he was domiciled when he died

on December 21st, [2nd] 1919. A number of points are raised; some concern the interpretation of the Constitution of the United States or of this State; others the construction of our Inheritance Tax Act of June 20, 1919, P. L. 521; and still others the meaning of testator's will. The argument took a wide range, possibly because of a belief regarding the importance of the question raised, due partly to the large amounts involved; and perhaps also because of a conviction, in which the writer shares, that the State should have as part of its public policy, a refusal to tax any gift for a "purely public charity," since no valid reason can be given for taxing the public for the benefit of the public. Whatever appellants' reasons may be, however, we are compelled to follow along the lines of the able arguments presented, though this results in what would ordinarily be considered an unnecessarily long opinion.

By testator's will (so far as it need be considered here), he gave to certain trustees "all the books, pictures, paintings, * * * antique or artistic furniture" * * * contained in his dwelling house in New York City, to be held by them until a corporation, to be known as "The Frick Collection," should be formed, under the laws of the State of New York, when these articles should be transferred to it; he gave the rest of his personal property in said dwelling house, and also in his residence at Pride's Crossing, Massachusetts, to his wife "excepting, however, from this bequest, all articles of personal property" given to the trustees and corporation above stated; he gave to the city of Pittsburgh a tract of 151 acres of land "as a public park," and to the Union Trust Company of that City, the sum of \$2,000,000, the income therefrom to be used in "maintaining,

improving, embellishing and adding to the said park, and keeping the same in proper condition;" and he directed "that all inheritance, legacy, succession or similar duties or taxes, which shall become payable in respect to any property or interest passing under my will * * * shall be paid out of the capital of my residuary estate," which, as found by the court below, amounted to \$24,704,126.55.

After the probate of the will, the executors paid to the United States the sum of \$6,338,898.68 being the Federal Estate Tax upon the property left by decedent; to various States and the Province of Quebec, the sum of \$1,084,459.42, being the inheritance taxes chargeable under their laws; to the State of New York the sum of \$131,000; and to this Commonwealth the sum of \$1,978,949.71, the inheritance tax which the estate admitted to be due. The governments specified do not concede the first three of these payments to be sufficient in amount; whether or not the last one is, is the question to be decided in this opinion.

By proper proceedings before the register of wills of Allegheny County, the amount of the tax due this State was found to be largely in excess of the sum already paid, whereupon the executors and one of the residuary legatees appealed to the orphans' court of the county, which determined a smaller amount was due, and later, on an adjudication of the executors' account, awarded to the Commonwealth the additional sum of \$1,188,248.16. It was reached by assessing the proper percentages on the total value of the real estate in Pennsylvania, and of the personalty wherever found (the valuations being agreed upon); the \$5,156,625.00 worth of realty located elsewhere not being considered or included.

From these two decrees the present appeals were taken; two of them by the Commonwealth, alleging additional taxes should have been assessed, and the other four by the executors and a residuary legatee, averring that too much was awarded. No claim was made upon the fund except by the State and the legatees; no creditor asked that distribution be delayed or a fund set apart to await a future adjudication of his claim; and no refunding bonds were required of the distributees, to whom the balance in the account was awarded. Hence, even if there are unpaid creditors, who hereafter present and prove their claims, they cannot, under our statutes, successfully maintain suits against the distributees or the executors, to obtain a refund of the sums paid by the latter to the former, on the faith of the court's decree, but can only have recovery against assets not appearing in the present account: Sections 49 (b) and 50 (a) and (b), Fiduciaries Act of June 7, 1917, P. L. 447, 515, 516-7.

The basic claim of the executors and residuary legatee being that the award is excessive, by reason of the fact that the court below improperly included, in the total valuation of the estate, certain of the assets left by testator, and mistakenly refused to allow certain credits against that valuation, in the natural order of consideration our first inquiry is: What does the Act of June 20, 1919, P. L. 521, under which the proceedings were had, provide regarding the tax and how it is to be calculated? Section 2 thereof provides, *inter alia*, that "In ascertaining the clear value of such (decedent's) estates, the only deductions to be allowed from the gross value of such estates shall be the debts of the decedent and the expenses of the administration of such estates,

and no deduction whatsoever shall be allowed for or on account of any taxes paid on such estates to the Government of the United States or to any other State or territory." And section 10 says: "The register of wills of the county, in which letters testamentary or of administration were granted upon the estate of any person dying seized or possessed of property while a resident of the Commonwealth, shall appoint an appraiser, whenever occasion may require, to appraise the value of the property or estate of which such decedent died seized or possessed." * * *

It is clear from these sections that the tax is to be levied upon "the clear value" of the entire estate (from which has been excluded, however, real estate located outside of Pennsylvania), after deducting only "the debts of the decedent and the expenses of the administration of such estates." The appraisement to be made is not of the legacies or devises but of the whole estate of a decedent; the debts and expenses of administration are not to be deducted from any particular gift or gifts, but from the whole estate, and the taxes paid to the United States or to any other State or territory, if permitted to be deducted, would have been from the whole estate. We therefore conclude that it is the entire value of the estate, less the credits specified, which forms the basis of the tax, and not the amounts received by the particular legatees; hence, as stated in *Knowlton vs. Moore*, 175 U. S., 41, that which the State "taxes is not the interest to which some person (or many) succeeds on a death, but the interest which ceased by reason of the death." Since this is the true construction of the Act, much of the argument made by these appellants, founded as it is upon the conten-

tion that the tax is levied only upon the particular gifts, when and as received, becomes ineffective because it has no relation to the actual status.

Basing their elaborate argument largely on their erroneous construction of the Act as last stated, the executors and residuary legatee who appeal, ask us to ignore the clear and unambiguous language of section 2, above quoted, and to decide that the court below erred "In ascertaining the clear value" of the estate, because it did not deduct from its "gross value" (a) The amount paid the Government for the Federal Estate Tax; (b) The amounts paid other States and the Province of Quebec for their inheritance taxes on decedent's real and personal property there located; and (c) The inheritance tax payable to this State. *Kirkpatrick's Estate*, 275 Pa., 271, is an express authority against the first of these claims; in principle it also decides the others adversely to these appellants. In deference to the able argument made, however, the supposedly new points presented will be briefly considered aside from that decision.

In support of their contention upon these points, they urge that refusal to allow those items to be deducted "adds the Federal tax, the tax paid to the other States," and that paid to this State, to the total valuation to which the tax rate is applied; this is erroneous. however, it simply refuses to allow those sums to be deducted from the "gross value of such estates" "In ascertaining the clear value" thereof, exactly as does the Federal Estate Tax Act (*New York Trust Co. vs. Eisner*, 256 U. S., 345, 349, 350), and many of the inheritance tax laws of other States. No valid reason is given why this may not be done. On the contrary, as stated in the

last cited case, where "the tax attaches to the estate before distribution,—if it is a tax on the right to transmit, or on the transmission at its beginning—obviously it attaches to the whole estate, except so far as the statute sets a limit."

Recognizing that their contention now being considered is in direct antagonism to the express language of the statute, these appellants in effect ask us to ignore this language, and from isolated phrases and words in the statute to reach an opposite conclusion, partially because of general expressions found in our opinions in *Oliver's Estate*, 273 Pa., 400, and *Kirkpatrick's Estate*, 275 Pa., 271,—though this question was not directly raised in either of them—apparently forgetting the basic rule that "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated": *Cohens vs. Virginia*, 6 Wheaton, 264, 397, per Marshall, C. J., *O'Malley vs. O'Malley*, 272 Pa., 536. Of course we cannot permit isolated expressions in a statute, or in any opinion of ours, to override the express language of the Act being construed.

It is further urged that there are constitutional objections to the provisions of the statute, if the deduc-

tions above referred to are not made. The only section of the Constitution of this State, which is supposed to affect the matter, is article IX, section 1, which provides that "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax." This, however, is not infringed, since the estates of all decedents are subjected to a uniform inheritance tax in all parts of the Commonwealth; and hence we turn to the provisions of the Federal Constitution, alleged to have been violated by the decree below, to see if they or any of them stand in the way of enforcing the statute as written.

The first claim regarding this is that it is "repugnant to clause 1 of section 8 of Article I of the Constitution of the United States, in that it interferes with the power of Congress to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." This is a veiled attack upon our dual form of government, and, in its ultimate analysis, would appear to be an attempt to deny to the States any right to exercise their taxing power upon subjects which the Federal Government may also tax. It needs no argument to show the error of such a contention. Moreover, there cannot be found anywhere within the four corners of the Act, in the practice under it, or in the decree below, the slightest evidence of a desire to interfere with the taxing powers of the United States.

It is further said that if the taxes paid the Government are not deducted our statute will be "repugnant * * * also to clause 2 of Article VI of the Constitution of the United States, in that it denies that the said Constitution and the laws of the United States made in

pursuance thereof * * * are the supreme law of the land, and that the judges in every State are bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." In this day probably no one would deny the supremacy claimed; this court never has. The principle contended for is wholly inapplicable, however. Given the fact, that a State may levy an inheritance tax on the value of the entire estate of a decedent, even though part of it consists of United States bonds (*Plumber vs. Coler*, 175 U. S., 115; *Orr vs. Gilman*, 183 U. S., 278), it necessarily follows that, in determining the way in which this tax shall be computed, it may, subject to constitutional provisions, refuse to allow any deduction for taxes paid to the United States and other States. "The right to dispose of one's property by will, and the right to have it disposed of by the law, after decease, is created by statute, and therefore the State may impose such conditions upon the exercise of this right as it may determine" (*Banker's Trust Co. vs. Blodget*, decided by the Supreme Court of the United States January 22, 1923, and not yet officially reported); hence the method of calculating the amount to be paid must necessarily be one for legislative consideration, for, as there stated, "The power of taxation, with its accessorial sanctions, is a power of government, and all property is subject to it." If the question of priority of right ever arises,—which American history since 1865 renders extremely doubtful,—the contention now made may become important; it does not arise here; in fact the Federal Estate Tax has long since been paid, while Pennsylvania is still seeking to collect the amount due to her.

It is also contended that the refusal to make these deductions, and the inclusion of the value of the tangible personalty, located elsewhere than in Pennsylvania (which will be further considered hereafter), made the decree below "repugnant * * * also to clause 1 of the 14th Amendment to the Constitution of the United States, in that it deprives the estate and the residuary legatees of property without due process of law, and also denies to them the equal protection of the laws." This contention is fully answered by what is said in *Keeney vs. New York*, 222 U. S., 525, 535: "The 14th Amendment does not diminish the taxing power of the State, but only requires that, in its exercise, the citizen must be afforded an opportunity to be heard on all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the State of the Power to select the subjects of taxation. * * * There can be no arbitrary or unreasonable discrimination;" but this can only arise (*Dane vs. Jackson*, 256 U. S., 589, 599) where the State tax law "proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation,—'to spoliation under the guise of exerting the power of taxation,' " a situation not alleged to exist under our statute. If, however, we pass to separately consider the two branches of the Amendment, these appellants are not helped.

Upon the question of "due process of law," we have not been favored with a single specification regarding either the Act, or the practice under it. The property being distributed on this proceeding is all in this State; appellants are our citizens and duly appeared and con-

tested the claim of the Commonwealth; all the facts are agreed to; the law applicable thereto has been passed upon by the Orphans' court, all of whose judges are learned in the law, is now under review by this court, and, judging from the record, and the suggestion in the brief, will subsequently be scrutinized by the Supreme Court of the United States. Wherein then have these appellants been deprived of "due process of law?" We agree that "A tax can only be imposed by the State when it has either jurisdiction over a person or jurisdiction over his property;" here it has jurisdiction over both, decedent having been and appellants being domiciled in the State, the latter appearing to the action, all the property now being distributed being within the State, and a valid State statute lawfully imposing the tax. Under such circumstances, it is only when the State does not "provide a fair opportunity for submitting the issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts," that the conclusion reached "is void because in conflict with the due process clause:" *Ohio Valley Water Company vs. Ben Avon Borough*, 253 U. S., 287, 289.

Nor is there any definite allegation as to how the estate is deprived of the equal protection of the laws, though this is asserted over and over again, not only in regard to the refusal to allow the deduction of the items specified, but also, as above stated, in regard to the inclusion of the value of the tangible personal property located outside of Pennsylvania. If the estate has been deprived of the "equal protection of the laws," since all the facts are agreed to, it should be easy to point out exactly how this is so. What has Pennsylvania done

which operates to "deny to any person within its jurisdiction the equal protection of the laws?" These executors and residuary legatees are accorded exactly the same protection given by this statute to every other person within its jurisdiction. Since then "the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied * * * (because) the law operates 'equally and uniformly upon all persons in similar circumstances'": *Billings vs. Illinois*, 188 U. S., 97, 103. It would be of no moment, even if it is the fact, that double taxation may result, so far as regards the tangible personalty located in New York and Massachusetts (*Blackstone vs. Miller*, 188 U. S., 189; *Fidelity & Columbia Trust Co. vs. Louisville*, 245 U. S., 54), for, if this is the case, every one else in like situation will be doubly taxed.

Two of the contentions made by these appellants are entitled to some further consideration. It is clear that neither testator nor any other decedent can, by his will, alter the amount which the Commonwealth is entitled to receive, save to the extent the statute itself specifies, that is, where the gifts are to a "father, mother husband, wife, children, lineal descendants born in lawful wedlock, legally adopted children, children of a former husband or wife, or the wife or widow of the son of a person dying seized or possessed thereof * * * or from the mother of an illegitimate child, or from any person of whom the mother is a lineal descendant, to such child, his wife, or widow (or) passing from an illegitimate child to his mother" (these being commonly called direct inheritances), but two per centum is to be charged upon the value thereof, and where the gifts are to collaterals,—which include all distributees

except those above specified,—five per centum is to be charged upon the value thereof. It necessarily follows that the direction of the present will “that all inheritances * * * taxes * * * shall be paid out of the capital of my residuary estate,” can have no effect in reducing the amount of tax to be paid to this State, but only operates, as between the two classes of gifts, to fix the ultimate payment upon the residuary devisees and legatees, in relief of the others, each of whom, but for that clause, would suffer an abatement of his or her devise or bequest, to the extent of the tax imposed upon its value. If this was not so, and a testator was permitted to reduce the amount payable to the State, by simply charging upon the residuary estate all the taxes paid elsewhere, the sovereign power of the State to impose them as it pleases, subject only to the requirement of equality and uniformity, would have to be made subject also, in this class of cases, to the unrestrained directions of a testator. Under such circumstances, a decedent who had a relatively large amount of property elsewhere, might, by the device stated, greatly embarrass and perhaps largely or wholly defeat the claim of the domiciliary State, even upon the value of the personalty within her own borders.

The inequity of this contention is particularly apparent as to the tax of other States on the realty located therein, the value of which is not considered in determining the amount of our inheritance tax. We fully agree with the contention of these appellants that it would be “quite preposterous to say that the State of Pennsylvania has any jurisdiction to impose a tax upon the tax which is paid to the foreign state upon the transfer of foreign real estate.” In the absence of a

statutory provision so authorizing, however, it would be at least equally preposterous to say that a legatee can have deducted from the actual value of the property in our State, which he inherits, the amount he or some one else pays some other State, upon the realty there situated, and pay our tax only on the difference and this, and not the imaginary levying of "a tax upon the tax which is paid to the foreign State," is the actual situation.

As to the inheritance tax paid to this State, we may further say that the Act discloses no trace of a purpose to permit the deduction of the tax itself, in order to determine the valuation upon which the tax is to be levied. On the contrary, section 16 expressly provides that before paying any legacy the "executor or administrator, or other trustee * * * shall deduct (the tax) therefrom at the rate of two per centum upon the whole legacy (if the inheritance is direct) * * * and at the rate of five per centum upon the whole legacy," if the inheritance is collateral. Hence it is palpably erroneous to say that the percentage to be levied on the "clear value of such estate," as calculated in the manner provided by the statute, should not be levied thereon, but on a sum which is that "clear value" less the tax itself; that is, in the case of direct inheritance on 98 per cent. of that value, and in the case of collaterals on 95 per cent. of it. Doubtless the legislature could thus provide, but it has not, and, so far as we are aware, no other legislature ever has pursued that course.

The next contention is that the tangible personal property given to the widow, and also that which was to become part of "The Frick Collection," is not subject

to this tax, because situated in other States than Pennsylvania. Every one concedes those assets cannot be taxed by this Commonwealth; they are incorporated into the great body of property of other States, and, by reason thereof, are necessarily subject only to their tax laws and other statutes: *St. Louis vs. Wiggins Ferry Co.*, 11 Wall, 423; *Leisy vs. Hardin*, 135 U. S., 100; *Pittsburgh & Coal Co. vs. Bates*, 156 U. S., 577. It is sometimes stated in general terms that the reason for this is that the right to tax is based on the protection accorded (*Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S., 194, 202; *Tappan vs. Merchants' National Bank*, 86 U. S., 490, 501; *Shaffer vs. Howard*, 250 Fed., 873, cited by these appellants) and hence, as the State of the situs is the only one which can give protection to the tangible property there located, it is argued that no other State can tax it, either directly or indirectly. This contention, founded as it is on general expressions only, is, as usually happens in such cases, plainly fallacious. Even the cases cited do not sustain the conclusion sought to be deduced from them. In *Union Refrigerator Transit Co. vs. Kentucky*, *supra*, which is much relied on by these appellants, the court is careful to say that it is only where "the taxing power is in no position to render these services or otherwise to benefit the person or property taxed" that the tax is objectionable. The other authorities are to the same effect. Surely the State-given right of transmission, by which these appellants seek a present award of \$24,704,126.55, may be said "otherwise to benefit" them.

Moreover, it is said in *Southern Pacific Co. vs. Kentucky*, 222 U. S., 63, 76, that "The legality of a tax is not to be measured by the benefit received by the tax-

payer, although equality of burdens be the general standard sought to be attained. Protection and taxation are not necessarily correlative obligations, nor precise equality of burden obtainable, however desirable. The taxing power is one which may be interfered with upon grounds of unjustness only when there has been such flagrant abuse as may be remedied by some affirmative principle of constitutional law." So far as we are aware no well considered opinion, certainly none of the cases cited by these appellants, in any way controverts those principles.

Besides, a multitude of authorities state, and these appellants concede, that this is not a tax on the tangible personalty in New York and Massachusetts, but only on the right of transmission given by the laws of this State, where testator and these distributees alike were and are domiciled. This class of taxes, *Union Refrigerator Transit Co. vs. Kentucky*, *supra* (page 211) says "are controlled by different considerations." It follows that as the right of transmission is State-created, and hence the Commonwealth can legally say and does say, upon what terms this testator may give and his legatees may receive property within her jurisdiction, for the reasons already specified, she may declare that the only basis upon which her conditions can be met, shall be by payment of a tax upon the value of decedent's property wherever located. When this right of transmission, coupled with the terms and conditions mentioned, fastens upon property, or becomes the medium by which its ownership or devolution is asserted, those who claim under the statute must do so *cum onere*, that is, must pay a tax, measured in the way stated; and this it has

been clearly held the Commonwealth has a right to require.

This conclusion is foreshadowed, but not expressly decided, in *Keeney vs. New York*, 222 U. S., 525, 539, where the property was in New Jersey at the time the inheritance tax was collectible and the property received by the distributees. In *Maxwell vs. Bugbee*, 250 U. S. 525, however, the question was squarely raised, and it is said at page 539: "It is next contended that the effect of including the property beyond the jurisdiction of the state in measuring the tax amounts to a deprivation of property without due process of law because it in effect taxes property beyond the jurisdiction of the state. It is not to be disputed that, consistently with the Federal Constitution, a state may not tax property beyond its territorial jurisdiction, but the subject matter here regulated is a privilege to succeed to property which is within the jurisdiction of the state. When the state levies taxes within its authority, property not in itself taxable by the state may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this court."

There are, moreover, other insurmountable obstacles in the path of these appellants. If it was necessary to obtain the express or implied consent of New York and Massachusetts, before this Commonwealth would be allowed to include, in the total valuation of the estate, the value of this foreign-located tangible personalty (which, of course, it is not), it would not be difficult to show that both were given; the former by the statutes of those States, hereinafter quoted, and the latter in the undisturbed comity existing between the States.

It is said in *Bullen vs. Wisconsin*, 240 U. S., 525: "As the States where the property is situated, if governed by the common law, generally recognize the law of the domicile as determining the succession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicile, whatever the limitations of power over the specific chattels may be." To some degree, of course, the rule of comity may be modified by the laws of the State where such personalty is located (see cases cited in *New Orleans vs. Stempel*, 175 U. S., 309, 313); but there is nothing appearing in the legislation of either New York or Massachusetts denying or qualifying the right claimed by this Commonwealth. True, there are provisions in their laws which differ from ours; notably those exempting charities from even this species of taxation, and limiting the proportion of the estate which a testator may give to charity. These relate, however, only to wills of testators there domiciled; the applicable statutory provisions regarding estates of non-resident decedents (showing also, if this is needed, the express consent of those States to the proceedings here), being as follows:

New York: "The validity and effect of a testamentary disposition of real property, situated within the State, or of an interest in real property so situated, which would descend to the heir of an intestate, and the manner in which such property or such an interest descends, where it is not disposed of by will, are regulated by the laws of the state, without regard to the residence of the decedent. Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of

such property, where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident, at the time of his death."

Massachusetts: Chapter 199, Section 1. "If administration is taken in this Commonwealth on the estate of a person who was an inhabitant of any other state or country, his estate found here shall, after payment of his debts, be disposed of according to his last will, if any; otherwise his real property shall descend according to the laws of the state or country of which he was an inhabitant."

Chapter 65, section 5. "Property of a non-resident decedent which is within the jurisdiction of the commonwealth at the time of his death, if subject to a tax of like character with that imposed by this chapter by the law of the state or country of his residence, shall be subject only to such part of the tax hereby imposed as may be in excess of the tax imposed by the laws of such other state or country, provided that a like exemption is made by the laws of such other state or country in favor of estates of residents of this commonwealth; but no such exemption shall be allowed until the tax provided for by the law of such other state or country shall be actually paid, guaranteed, or secured in accordance with the law."

We agree, therefore, with counsel for the Commonwealth, that under the circumstances stated "it is mere metaphysics to argue whether the transfer (of the tangible personality under consideration) is effected by virtue of the law of the situs or the law of the domicile; the fact is that tangible personal property passes according to, and in the manner provided by the law of the domicile." We are clear, also, that there is no legal ob-

jection to including the value of the tangible personal property located in New York and Massachusetts; and this conclusion would probably be inevitable also (even if there was no comity existing between those States and ours, and no statutes of theirs on the subject), because of the admitted facts that all of the assets presently being distributed, and now claimed by these appellants, are located in Pennsylvania, and the will of testator, through which their right is derived, requires the tax to be paid out of them. For the reasons stated, no claim to these assets can successfully be made, save upon compliance with our statute requiring the payment of an inheritance tax on the value of all the tangible property there located, as well as on the value of the real and personal property in this State.

The principles stated answer also the contention that the tax cannot be assessed at this time, nor any interest charged, because some disputed and contingent claims have not been paid, and hence, it is not yet known what amount should be deducted for them and for administration expenses in adjusting them. If, however, the Act of 1919, provides that this character of tax shall fall due at a given time after a decedent's death, it must then be paid; and if it fixes a date from which interest shall run, it will begin to run from that date. It is erroneous to assert that interest upon a liability never begins to run until the principal is payable; this is so only when no provision is made on the subject; *Morris vs. Ellwood*, 275 Pa., 319. Many notes, to be paid in the future, carry "interest from date;" and this may always be provided for by contracting parties, and by statute in cases within the State's power to levy and collect. It is only necessary, therefore, to see what the Act of 1919

says as to the time the tax shall become due and payable, and from what date interest shall run, remembering always that the tax is on the estate in its entirety, and not on each devise and bequest, when and as payable, as these appellants erroneously contend.

It must be admitted the Act might have made clearer the answer as to the time when the tax is due, but enough appears to show the legislative intention. Section 14, which relates to the property of resident decedents, provides that "Whenever any such tax shall have remained due and unpaid for one year the register may apply to the orphans' court, by bill or petition, to enforce the payment of the same." Section 29 says that "Whenever any tax imposed by this Act upon the transfer of property of a non-resident decedent within this Commonwealth shall have remained due and unpaid for one year, the Auditor General may apply to the court of common pleas of Dauphin County, or of any county in which such property may be situated, by bill or petition, to enforce the payment of the same" or may sue to recover it in "any court of this Commonwealth or elsewhere." And section 38, which relates to both resident and non-resident decedents, provides that "If the tax is paid within three months after the death of the decedent, a discount of five per cent will be allowed. If the tax is not paid at the end of one year from the death, interest shall be charged at the rate of twelve per centum per annum on such tax." * * *

The last sentence above, fixes the fact that interest begins to run at the end of the year; and all the provisions quoted, when considered together, may fairly be construed to mean that the tax is due and payable not later than the end of the year, which time had expired

before the award appealed from was made. The court below did not err, therefore, in directing the payment of the tax on the instant distribution, the assets in which, as well as those not included in the present account, but nevertheless included in the tax valuation, belonging alike to these appellants, who are, by this distribution, awarded a large part of the estate. It may be well to add that sections 20 and 40 of the Act provide an adequate remedy for recovering back any excess payment made to appear by reason of later developments in the estate.

By the Act of July 9, 1919, P. L. 794, it is provided as follows: "All estates in any building, ground, books, curios, pictures, statuary, or other works of art, passing by will from a person seized or possessed thereof to any municipality, corporation or unincorporated body, for the sole use of the public by way of free exhibition within the State of Pennsylvania, whether in trust or otherwise, shall not be subject to any collateral inheritance tax for the use of the Commonwealth." No other statute grants exemption from inheritance taxes. By virtue of the provision quoted, the Commonwealth concedes that the value of the land given to the city of Pittsburgh for a public park should be deducted from the "clear value of the estate," in determining the amount upon which the tax should be assessed, but claims that the \$2,000,000 bequeathed for the purpose of keeping the park in order, should not be deducted. The court below erroneously decided otherwise, stating as its reasons that the legacy was given "for the purpose of completing the gift of the land, to effectuate the purpose of the testator," and was no "more than will be

reasonably required to maintain and embellish said land for park purposes."

It will be noticed, however, that the statute nowhere refers to money gifts, but expressly states what subjects shall be exempted from the payment of the tax. It does not say "all estates * * * given for the sole use of the public," but that "all estates in any building, ground, books, curios, pictures, statuary or other works of art," given for such use, shall be exempted, and by no process of reasoning can a money gift be held to come within any of these classes. It follows, therefore, that the \$2,000,000 should not have been deducted in fixing the amount upon which the tax is levied; not only because provisions exempting property from taxation must be strictly construed (*Bank of Commerce vs. Tennessee*, 104 U. S., 493; *Comm. vs. Northern Electric L. & P. Co.*, 143 Pa., 105, 109), but also because the expression of the particular things which shall be exempted, excludes all other subjects: *expressio unius est exclusio alterius*.

Among other personalty owned by testator, located in his dwelling house in New York City, were a Louis XV. Tulip Rosewood Library Table, which was appraised at \$5,500, and a 16th Century French Walnut Cabinet, appraised at \$35,000. The Commonwealth claims that they are "antique * * * furniture," within the meaning of those words in the foregoing quotation from testator's will, and hence were included in the gift to the trustees for the benefit of The Frick Collection, and upon their appraised value a tax of five per cent. should be assessed, although that corporation refused to receive them because they were given by the will to the widow, who, under the decree below, pays a

tax at the rate of two per cent. only. The court below overruled this claim because of an agreement of all the parties interested, including the Commonwealth, that these and the other articles of furniture in testator's New York home were "nothing more than the ordinary furniture and furnishings suitable for such residence." Since that which is "nothing more than ordinary furniture" and "antique * * * furniture" are not or may not be the same, and there is no evidence compelling the conclusion that they are not, we cannot convict the court of error in holding they are not "antique * * * furniture" within the meaning of the will. Moreover, the refusal of "The Frick Collection" to receive them as "antique * * * furniture" necessarily resulted, if they were such, in their falling into the residue, upon which the tax imposed on their value would have been at the rate of two per cent., exactly as it was charged in the decree appealed from.

There is one other matter, not referred to in the assignments of error, but to which our attention is specifically called by a stipulation between the Commonwealth and the parties interested under the will. It appears that testator had purchased what are known as the Fragonard Panels, which were appraised at the value of \$750,000, and the Boucher Panels, which were appraised at the sum of \$150,000; and had "reconstructed the rooms, in which his art collection was to be exhibited, so as to contain said panels, and they were placed therein and are now there, being applied to the walls of the rooms." Whether or not the result of this was to make them a part of the realty, under the laws of New York, we do not know, except as we may infer the negative, since apparently their value was included in

fixing the amount upon which the tax was assessed, and no assignment of error objects to this. Because of the doubt on the subject, however, and of testator's very generous disposition of his property, for the benefit of the public generally, the order we enter will be without prejudice to the rights of the parties in interest to make application to the court below for a reopening of the decree, and a determination of this question, notwithstanding our general conclusion as to the proper inclusion of the value of the personal property directed to be conveyed to "The Frick Collection."

The judgment of the court below is reversed, in so far as relates to the legacy of \$2,000,000 for the maintenance of the park given to the city of Pittsburgh, and is affirmed as respects all the other questions raised on these six appeals [without prejudice, however, to the rights of the parties in interest to apply for a reopening of the decree, so far as it includes the value of the Fragonard Panels and the Boucher Panels, in determining the amount of the tax]; the costs on all the appeals to be paid by the estate.

Frazer, J. files a dissenting opinion.

Subsequently, on June 23, 1923, on motion of appellants, the Supreme Court modified the judgment in these cases, by eliminating the portion enclosed in brackets, making it read as follows:

"The judgment of the court below is reversed, in so far as relates to the legacy of \$2,000,000 for the maintenance of the park given to the City of Pittsburgh, and is affirmed as respects all the other questions raised on these six appeals; the costs on all the appeals to be paid by the estate."

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**Dissenting Opinion in the Supreme
Court of Pennsylvania.**

IN THE SUPREME COURT OF PENNSYLVANIA
Western District.

IN RE
ESTATE OF HENRY C. FRICK,
deceased.
APPEAL OF
COMMONWEALTH OF PENN-
SYLVANIA, *et al.*

Nos. 39, 40, 42, 43, 44
and 45, October Term,
1923.

Appeal from the O. C. of
Allegheny County.
Filed April 30, 1923.

DISSENTING OPINION.

FRAZER, J.:

A question is raised in this proceeding as to the right of the state to tax that part of decedent's property paid to the United States government in the form of an estate tax. There can be no doubt as to the meaning of the Act of 1919. The legislature plainly intended, by Section 2, to prevent the deduction of such tax before assessing the state transfer tax. The statute was passed to overcome the decisions of this court in *Otto's Estate*, 257 Pa., 155 and *Knight's Estate*, 261 Pa., 537, wherein we held that, in computing the net value of the estate, taxes due the federal governments and foreign states should be deducted. The Act of 1919, on the point here involved, was construed by this Court in *Kirkpatrick's Estate*, 275 Pa., 271. The writer dissented from the conclusion reached in that case by the majority of the Court, but filed no opinion setting out

his reasons for such dissent. In view of the presentation of the same question in this proceeding, and of the further fact that this case will probably be taken before the Supreme Court of the United States, it seems proper that reasons for such dissent be briefly stated.

The power of the United States to tax is limited only by the extent of the necessity for raising money to meet the various needs of government. "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied." *McCullough vs. Maryland*, 17 U. S., 315, 429. The opinion in which this language was used firmly established the principle that a state is without power to tax an instrumentality of the Federal Government—a principle which has been constantly followed and applied in the century elapsed since the decision there rendered. The general rule is, therefore, that states are without authority, by taxation or otherwise, to in any manner control or interfere with the operations of the Federal Government, or the instrumentalities by which that government is carried on. The latter is supreme within its sphere of action, and, where there is inconsistency or conflict, the state laws and regulations must yield for the benefit of the whole. If the State of Pennsylvania is permitted to tax property appropriated by the Federal Government under its taxing power this, in effect, permits the state to collect revenue from property set aside for the use of the United

States. If we concede the state tax is on the right to transmit the property and not on the property itself, still the total estate has been depleted by the amount of the federal tax and it is only the balance thus remaining decedent has a right to transfer and if the total estate is taken as the basis of the state tax, the effect is to give the state a revenue derived from a fund set aside for the benefit of the United States. The federal tax is an estate tax payable out of the estate of decedent and is imposed, regardless of the will of the decedent, on the gross estate, after deducting designated items: *Knight's Estate, supra*. The right of the United States to first collect its tax seems to be conceded and if the right of the United States to tax includes the right to tax to any amount, or to take the whole where necessary, the result of holding that the federal tax should not be deducted before computing the state tax might be to impose a combined state and federal tax exceeding the value of the property. Let us suppose, for example, that the federal tax is sixty per cent. of the estate and the state tax an equal amount. The result would be that the estate would owe in taxes twenty per cent. more than its value, regardless of what that might be. While it may be argued that this situation would not be likely to arise, and indeed presents a very remote possibility, yet it shows the logical result of permitting two or more sovereign powers to levy a tax on the whole of a decedent's estate. The fact that the right of succession is a state right and not within the control of the federal government does not give to the state the power to take away from the federal government the subject matter of the tax, as was suggested in the opinion of the majority of this

court in *Kirkpatrick's Estate*, *supra*, inasmuch as, under the federal law, the tax is on the estate as a whole and not on the transfer to the beneficiary and the justification for the tax is the ending of the estate by death rather than the beginning of a new estate by succession: *Knowlton vs. Moore*, 178 U. S., 41.

The majority opinion holds exempt the land given to the City of Pittsburgh as a public park but imposes a tax of 5 per cent. on the fund of \$2,000,00 given for the purpose of taking care of the property. It is conceded the sum so given is not in excess of the amount necessary to properly improve and maintain the park and that, in absence of such gift, the city would be obliged to tax its citizens to provide for such maintenance. It is true the Act of 1919 refers in its exemptions only to "estates in any buildings, ground, books, curios, pictures, statuary or other works of art" given for public purposes and does not specifically mention funds left for maintenance of such objects. Any distinction between the gift of land for a park and the gift of a sum of money for its maintenance or for the purchase of property to be used as a park, is but an arbitrary one and not based on a real difference in the purposes or object of the gift. Granting the power of the legislature to make an arbitrary distinction if it sees fit to do so, the question is whether this has been done in the Act of 1919.

If the statute in question is to be construed strictly, then the majority opinion of the court is undoubtedly right. The argument for such strict construction, however, is based on prior decisions rendered in cases involving, not the question of exemption of public property, but exemption of private property held for charit-

able or other purposes, bringing it within the laws providing for exemption from taxation. There is a clear distinction in the law applicable to these two classes of cases. Public property is never subject to tax laws and no portion of it can be without express statutory enactment. Accordingly, no exemption is needed for public property held as such: *Poor Directors vs. School Directors*, 42 Pa., 21; *Pittsburgh vs. Sterrett Sub-District School*, 204 Pa., 635, 641. Exemption is the rule and taxation the exception. In considering legislation of the character here in question, it is always to be presumed that general language is used with reference to taxable subjects, and the property of municipalities does not fall within the ordinary designation of taxable subjects: *County of Erie vs. City of Erie*, 113 Pa., 360. To levy a tax on such property would merely mean the assessment of new taxes to meet the liability which the city had imposed upon itself and no benefit would accrue. On the contrary, an additional liability would result, measured by the expenses of imposing and collecting the tax. For this reason, it is not reasonable to conclude that a law, however general, was intended to reach property held by the public for public purposes. While such property may be taxed if the legislature sees fit to provide, the intention must be clearly expressed or necessarily implied. On the other hand, as to private property, even though held for private charities and therefore exempt as such, a different rule applies. In such case liability to taxation is the rule and the person claiming exemption must point to an express statute granting relief from the burden. An illustration of this

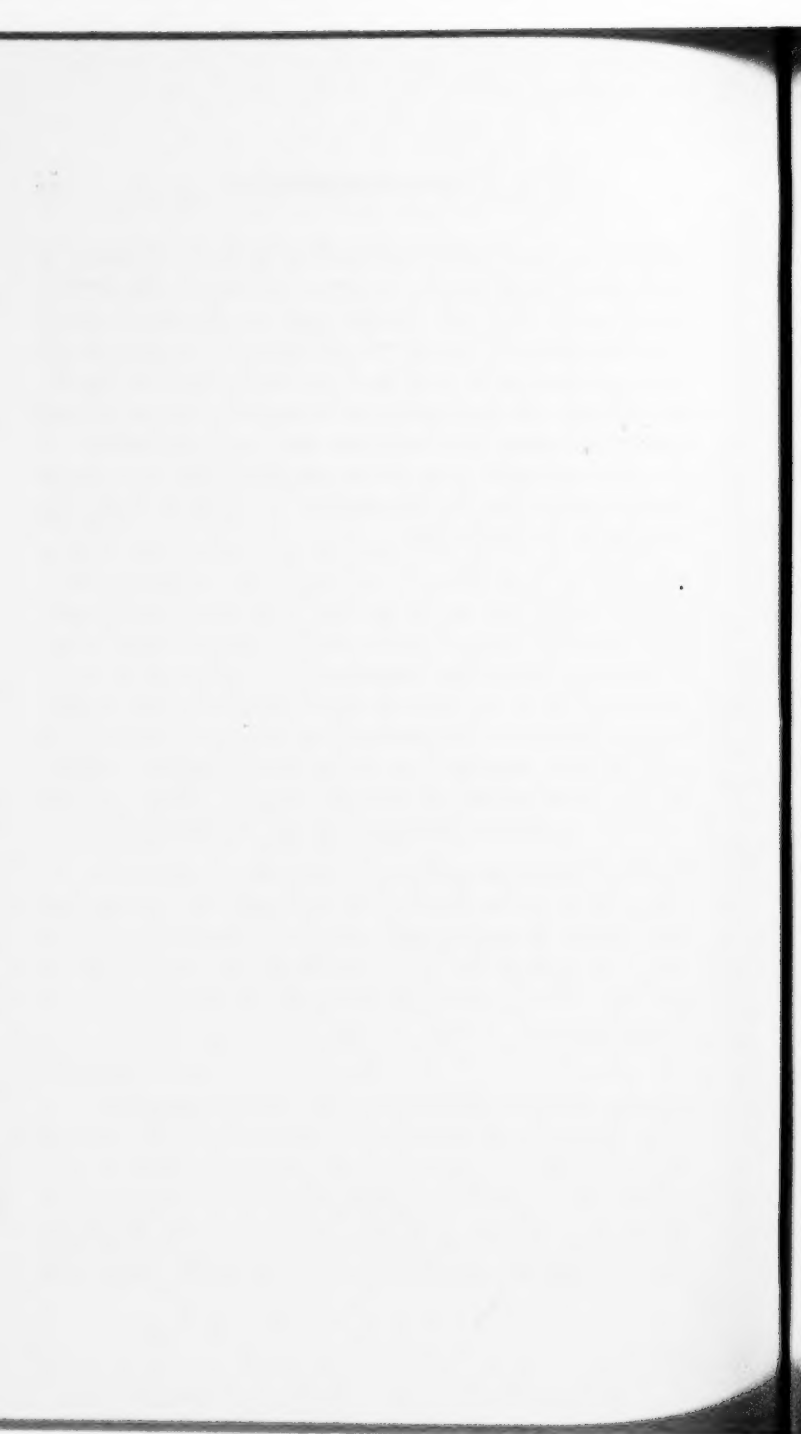
is found in *Robb vs. Philadelphia*, 25 Pa. Superior Ct., 343, which followed the general principles established many years ago by this court. In the course of the opinion in the case just cited, it was said (Page 346): "There is this distinction for the purpose of taxation between property owned by a church and that owned by a municipality and devoted exclusively to public purposes. The church must show ground on which its property is exempt. The public property of a municipality cannot be taxed unless there is the clearly manifest legislative intention that it shall be subject to the imposition. Property belonging to the state and its municipalities, and which is held for governmental purposes, is presumed to be exempt, and is not included in any designation of property to be taxed however sweeping, unless the statute authorizing the tax expressly provides." Citing *Pittsburgh vs. Sterrett Sub-District School*, *supra*, wherein appears an elaborate review of the authorities of our own and sister states.

It is also to be noted, as having an important bearing on this question, that the settled policy of the state is to exempt from taxation "institutions of purely public charities," and that they "may be exempt by necessary implication of law;" *Mattern vs. Canevin*, 213 Pa., 588, 589-90, construing Art. IX, Sec. 1, Constitution of Pennsylvania.

Applying the foregoing principles to the present case, it seems a narrow construction of the act in question to exempt existing physical things devised for public purposes, such as buildings, ground, books, curios, works of art, etc., and to refuse to exempt a monetary gift made either for the purpose of purchasing such

objects or maintaining those already in existence. The purpose and spirit of the law applies to the money equally with the objects enumerated. Bearing in mind the principles above stated, showing the policy of our law, it seems to the writer of this opinion that the Act of 1919 should be construed to include money left by will to maintain the charitable objects there exempt.

Entertaining these views on the questions briefly stated above, the writer enters his dissent from the opinion of the majority.



BRIEF IN SUPPORT OF PETITION.

Mr. Frick was born in the State of Pennsylvania, and Pittsburgh was his domicile. His estate at the time of his death amounted approximately to one hundred million dollars. By his will he left about three-fourths of his entire estate to charity—to hospitals, to universities, to the creation and endowment of a great park in Pittsburgh, and to the incorporation of a wonderful art institute in New York City, which should be forever free to all people, and to which he gave his New York residence, appraised at over \$3,000,000, his art collection, inventoried at over \$13,000,000, and an endowment fund of \$15,000,000.

In Mr. Frick's will he provided that all inheritance taxes should be paid out of his residuary estate. He bequeathed 87 per cent. of the residuary estate to hospitals and colleges and 13 per cent. to his daughter.

When Mr. Frick died he owned property, real and personal—some tangible, some intangible—in eighteen states and in the Dominion of Canada.

At once the United States and these nineteen other sovereignties stretched out their hands for money, and all sought to exact as taxes the last penny possible from the money which Mr. Frick had left to these charities. The estate has settled (sometimes by compromise, sometimes by litigation) with all these sovereignties except the United States and State of Pennsylvania. The executors paid the United States \$6,338,898.68, which they admitted to be due to it, and to the State

of Pennsylvania \$1,978,949.71, which they admitted was due it. The United States claims a further sum approximating \$3,000,000, which is still under discussion with the Department of Internal Revenue. A part of this is directly involved in this case and awaits its decision, since one of the vagaries of the United States inheritance tax law, as it is administered, is that, in cases where the taxes are thrown upon residuary estates which are bequeathed to charity, the more tax you pay to the several states the more tax you have to pay also to the United States. The State of Pennsylvania claims additional estate tax to the amount of \$1,185,158.14, with interest from December 2, 1920. The Pennsylvania court of last resort has decided that this amount is due. To review this decision a writ of error has been sued out; and it is to review this decision also (in case a writ of error is not the proper remedy) that a *certiorari* is now prayed for.

The petitioner believes that this additional tax should not be paid, because the Pennsylvania Transfer Inheritance Tax Act as construed by the court violates the Constitution of the United States.

The broad question involved is one of jurisdiction or power. The petitioner contends (1) that Pennsylvania cannot levy a transfer inheritance tax on tangible articles of personal property which are located in other states; (2) that in ascertaining the taxable value of the estate which is subject to inheritance taxes in the state of Mr. Frick's domicile, the "paramount" taxes which have to be paid to the United States and other states must be deducted—in this case the United States estate tax and the estate or succession

taxes levied by states other than Pennsylvania on the transfer of shares of capital stock of corporations of other states than Pennsylvania; (3) that in this case, where all inheritance taxes are cast by the terms of the will on the residuary estate, before the tax is calculated a deduction from the estimated value of the estate must be made of the inheritance taxes paid to other states on real estate located in said states and of the inheritance tax paid to the State of Pennsylvania on the general and specific legacies and devises.

After the opinion in this case was handed down by the Supreme Court of Pennsylvania, deciding these questions against your petitioner, an application was made to that Court for the allowance of a writ of error. The petition was accompanied by a petition for a modification of the decree and, as required by the rules of the Pennsylvania Supreme Court, by a petition for a re-argument of the case. On the 23rd day of June, 1923, the Court entered an order amending its prior decree, and made an order dismissing the petition for a re-hearing and also made an order allowing a writ of error from the Supreme Court of the United States. Subsequently the writ of error was formally allowed by the Chief Justice of the Supreme Court of Pennsylvania, a supersedeas bond approved by him, and the writ of error was sued out and filed, together with a certified copy of the record, etc., in this Court at this number and term.

In the judgment of petitioner's counsel, this case falls within the class of cases reviewable by a writ of error.

The provision of the Pennsylvania statute imposing a tax on foreign tangibles is this:

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases:

(a) When the transfer is by will or by the intestate laws of this Commonwealth from any person dying seized or possessed of the property while a resident of the Commonwealth, whether the property be situate within this Commonwealth or elsewhere." (Act approved June 20, 1919, Article I, Section 1, P. L. 521, West Publishing Company's Compilation of Pennsylvania Statutes, Section 20465).

The provision of the Pennsylvania inheritance transfer tax act which relates to the tax upon the paramount taxes, is:

"In ascertaining the clear value of such estates, the only deductions to be allowed from the gross values of such estates shall be the debts of the decedent and the expenses of the administration of such estates, and no deduction whatsoever shall be allowed for or on account of any taxes paid on such estate to the Government of the United States or to any other State or Territory." (Act, approved June 20, 1919, Article I, Section 2, P. L., p. 522; West Publishing Company's Compilation of Pennsylvania Statutes, Section 20466.)

The petitioner's contention in the case is that this statute violates her rights under the constitution and laws of the United States.

It is submitted that under the decisions of this Court this case is reviewable by a writ of error, which was properly granted. *Dahnke-Walker Milling Co. vs. Bondurant*, 257 U. S., 282; *Eureka Pipe Line Co. vs. Hallanan*, 257 U. S., 265; *United Fuel Gas Co. vs. Hallanan*, 257 U. S., 277.

The facts are entirely different from the facts in *Dana vs. Dana*, 250 U. S., 220, a case for which this court held *certiorari* to be the correct remedy. In the *Dana* case the writ of error was dismissed because neither the validity of the statute nor the validity of any authority exercised under the state was drawn in question. The court below, the Supreme Judicial Court of Massachusetts, had decided the case on the view which it took of the question whether the property sought to be taxed was real estate or personal property. This court, therefore, held that the Federal question could be raised only on *certiorari*.

Inasmuch, however, as the opinion of counsel may be erroneous on the question of which remedy is the proper one in this case, a petition for a *certiorari* also has been filed.

This brief is filed for the purpose of showing the court that there are Federal questions of public and general importance involved in the case which have never been decided by this court and on which there are conflicting decisions by State Courts.

POINT I.

The Legislature of Pennsylvania Has No Power to Tax the Transfer of Tangible Chattels Situate Beyond Its Boundaries.

The State of Pennsylvania has, by act of Assembly, undertaken to tax all property of a resident decedent, real and personal, wherever situated :

A transfer inheritance tax amounting to more than \$600,000 has been levied on tangible chattels which belonged to Mr. Frick at the time of his death, and were then located in New York and Massachusetts.

These tangibles consisted of (a) the art collection, valued at more than \$13,000,000 and located in Mr. Frick's house on Fifth avenue in New York City; (b) furniture, household supplies, etc., located in said house; (c) pictures, furniture and furnishings—live-stock, agricultural implements, etc., located at his estate and summer home at Pride's Crossing, Massachusetts.

So far as the Massachusetts tangibles are concerned upon which the State of Pennsylvania has levied a transfer inheritance tax based on a valuation of \$318,429.25, it has been stipulated that they "consisted of nothing more than the ordinary furniture and furnishings suitable for such residences and estates."

The art collection had an inventoried value of \$13,132,391, and upon this the State of Pennsylvania levied a 5 per cent. tax. This art collection, owned by Mr. Frick at the time of his death, consisted of a great many art treasures, mostly antiques of European and Asiatic origin, and of paintings, rugs, furniture, bronzes, porcelains, etc. Some of the articles, such as panel pictures, were of so unusual a character as to require special rooms to be constructed to hold them. The panel pictures were applied to the walls.

The art collection was at the time of Mr. Frick's death located in the City of New York in the building occupied by him at that time as one of his residences. The building was completed and first occupied by Mr. Frick in 1914, and in 1915 Mr. Frick made his will, in which he made provision for carrying out his intent that the building and its contents should become a permanent public gallery of art to which the public should "forever have access." Subject to the right of Mrs. Frick to occupy the land and building as one of her residences so long as she desired to do so, the land was devised to a corporation to be incorporated by the State of New York, and to be known as "The Frick Collection." Mr. Frick by his will bequeathed all the works of art constituting the collection to this corporation. He provided in his will and made it a condition of the bequest that these chattels should be forever held, maintained and preserved in this house. He bequeathed to the corporation \$15,000,000 also as an endowment fund.

There is no room for fictions or theories as to what the *situs* of these chattels was and is. Every one of

the articles which constitute this collection has a real physical existence and necessarily has a *situs* as surely as the building has. Indeed by the terms of Mr. Frick's will the articles never can be removed to any other *situs*.

In considering a question of this kind, one must bear in mind that where tangible chattels are located in a sovereignty other than that of the decedent's domicile, they must be administered by an ancillary administrator or executor of the country of their *situs*, and that not only have the local creditors the right to be first paid before anything is transmitted to the state of the domicile, but resident specific legatees, and in some instances even general legatees residing in the country where the chattels are, have the right to have their legacies paid before the balance is remitted to the principal administrator.

Harvey vs. Richards, 1 Mason, 381.

In this case Mr. Justice Story says that unquestionably the specific legatee is entitled to claim in the jurisdiction where the chattel is, although there be only an ancillary administrator there. So it is perfectly clear in this case that the courts of New York will see to it that this legacy to the Frick Collection is kept in the State of New York. It is the duty of the corporation, the Frick Collection, also, to see that these chattels remain in New York and are distributed to it. And the State of Pennsylvania has no way by which it could get this collection into the State of Pennsylvania and administer it there.

The law of England is the same.

In re Lorillard, Griffiths vs. Catforth (1922),
2 Ch., 638.

The testator, who was domiciled in New York, left assets in England, where there was an ancillary administration. The legatees under the will resided in England, and upon claim being made by the principal administrator in New York that the assets after payment of the British debts should be remitted to him, the application was denied by the English Court of Chancery, which held that the resident beneficiaries under the will had the right to have the balance in the hands of the ancillary administrator distributed to them. Lord Justice Warrington says:

"The persons entitled to the unadministered residue are in this country, and the Court will not order these moneys to be sent to an administrator abroad."

The proposition contended for by petitioner is that the State of Pennsylvania cannot impose an inheritance tax upon the transfer of Mr. Frick's tangible personal property, tangible chattels which were situated outside the State of Pennsylvania, and which, consequently, are not situated in the State of Pennsylvania. The obligation imposed upon a state by the Fourteenth Amendment to the Constitution of the United States requires that the subject-matter of the state's action shall be within the jurisdiction of the state, that is, within its territory. This proposition is so thoroughly established that a justification of the tax imposed by

the State of Pennsylvania in the instant case must be founded either (a) upon the fiction expressed by the words "*mobilia sequuntur personam*"; or (b) upon the proposition that the title to decedent's tangible property outside of the state passes by virtue of the laws of the state of the domicile, and that, therefore, both the state of the domicile and the state of the *situs* can tax; or (c) that because there is money being distributed by the Pennsylvania courts to beneficiaries who must come into Pennsylvania to get their share in the distribution, the State of Pennsylvania can impose a tax upon the property in Pennsylvania and determine the amount of the gross value of the estate by adding to it the property outside the state, which it cannot tax.

(a) In view of the decisions of this court and of the Supreme Court of Pennsylvania, it could not be successfully contended that the fiction of *mobilia sequuntur personam* authorizes the tax, because, under the decisions of the court the fiction must yield to the facts. (*Eidman vs. Martinez*, 184 U. S., 578—see opinion of Mr. Justice Brown, pages 581-582; *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S., 194—see opinion by Mr. Justice Brown, page 206; *Metropolitan Life Ins. Co. vs. New Orleans*, 205 U. S., 395—see opinion by Mr. Justice Moody, page 402.)

The Supreme Court of Pennsylvania did not attempt to sustain this contention.

(b) The second proposition, that the power of the state to tax could be sustained because the succession to articles of personal property passes under the laws of the state of the domicile, is, we submit, unsound.

While the Supreme Court of Pennsylvania discusses this point, it does not base its decision upon it.

Tangible personal property is subject to the dominion of the sovereignty where it is situated. The question who is to be recognized as its owner during the life of the owner is a question solely for the sovereignty where the property is located. To whom the title passes when its owner dies is determined by the law of that sovereignty alone, and does not depend in any degree whatsoever upon the law of any other sovereignty. The question in this case is the validity of Mr. Frick's will in New York and Massachusetts. Is his will valid under the laws of those states? There must be a compliance with the laws of those states before the will will pass title to tangible property in those states. This is true, even though the laws of those states say that the will of a non-resident *executed* in the manner required by the state of his domicile is valid in New York and Massachusetts.

In *Keeney vs. New York*, 222 U. S., 525, Mr. Justice Lamar says (page 537) :

"The real estate and tangible property in Texas were not within the taxing jurisdiction of the State of New York and there was no effort to tax the transfer of that property."

While this statement of Mr. Justice Lamar's is only an expression of his opinion and was not necessary to the decision of the case, it is an expression of opinion in the only case, we believe, that ever reached this court, where there had been any question as to the power of

the state of the domicile to levy an inheritance tax upon tangible chattels located in another state.

The Pennsylvania Supreme Court, in its discussion of this point in its opinion, seems to imply that *Bullen vs. Wisconsin*, 240 U. S., 625, is an authority for the proposition that the State of Pennsylvania could impose this tax upon these tangible chattels. In *Bullen vs. Wisconsin*, however, the property consisted entirely of *intangible* property; and when Mr. Justice Holmes in his opinion speaks of the law of the domicile as being needed to establish the inheritance, he is speaking of *intangible* articles of personal property, and is referring to the cases of "contracts and stock" as illustrative of the point.

There are two decisions of state courts of last resort in which it was expressly held that inheritance taxes can not be imposed by the state of the domicile of the decedent upon tangible chattels situate in another state.

In *Weaver's Estate*, 110 Iowa, 328, it was held that an inheritance tax could not be imposed by the State of Iowa upon a herd of cattle which was in Missouri.

In *State vs. Brevard*, 62 North Carolina, 141, the testator was domiciled in North Carolina but owned property, consisting of realty and personalty, in the State of Alabama. Among his property in Alabama was the Vesuvius Furnace with all its appurtenances, which doubtless included some personal tangibles, but which the report of the case expressly shows

included a number of negro slaves. It was held that this tangible property could not be taxed for inheritance tax purposes in North Carolina, the state of the domicile. The opinion is based upon the reasoning in the very exhaustive opinion of the court in the earlier case of *Alvany vs. Powell*, 55 North Carolina, 51.

The same principle is laid down in *Josylin's Estate*, 76 Vermont, 88. In that case the court held that the State of Vermont could not levy an inheritance tax upon an indebtedness due to a resident decedent from a non-resident, because the real *situs* of the thing was the state of the debtor, and the debt could only be collected by means of the laws of that state. Judge Stafford says (page 92) :

"* * * this portion of the estate did not pass by force of our law at all, for that law had no force in the domicile of the debtors. It passed by force and virtue of the law of those jurisdictions. If they recognize our law as the rule to be followed in distributing the personal estate, just as they would have recognized the law of the place where a contract was made as the law of the contract, that did not make it that the property passed by force of the law of this state, but only that it passed in the same manner as it would have passed by our law."

And again at the bottom of page 93 :

"The hand that passes the estate from one generation to another retains a portion as a sort of toll for the service. Which sovereignty is that? Clearly the one which has the right to say who shall succeed."

The only case cited by the State of Pennsylvania, where a court of last resort has decided that a state may levy an inheritance tax upon tangible articles outside its boundary is *Matter of Estate of Swift*, 137 N. Y., 77 (1893). This is a very curious case; for the only opinion filed is an opinion written by Mr. Justice Gray to sustain the proposition that the tax was invalid. But he says at the end of his opinion that his brethren do not agree with him, and that therefore the decision of the court below is affirmed. So this case is very little authority. All that we know about the case is that the judges of the Court of Appeals of the State of New York decided that the tax was valid, but gave no reason whatever for their decision, while the only opinion filed does demonstrate quite conclusively that such articles are not taxable.

While it was claimed by the respondent's counsel in their brief before the Supreme Court of Pennsylvania that there were two other cases (*Carpenter vs. Pennsylvania*, 17 Howard, 456, and *Hartman's Estate*, 70 N. J. Eq., 664), in which state inheritance taxes upon tangible chattels located outside of the state had been sustained by the courts, an examination of the cases themselves shows that they do not support the contention of the respondent.

In the report of the case of *Carpenter vs. Pennsylvania*, 17 Howard, 456, the only reference to what the personal property was is a statement of Mr. Justice Campbell, made in delivering the opinion of this court, on page 461, which is as follows:

"In that settlement the executor represented

that a portion of the estate, consisting of securities, stocks, loans, and evidences of debt and property, was not within the commonwealth * * *."

There surely is nothing here to show that any of the property involved was *tangible* personal property. The case was an appeal from the Pennsylvania Supreme Court in *Short's Estate*, 16 Pa. St. Reports, 63. The statement of facts in the report of that case on page 63 states explicitly that decedent "owned a large amount invested in stock and corporations in other states, some bonds of the State of Kentucky, etc., in all exceeding half a million of dollars, and above \$1000 of cash in a bank in New York." This certainly disclose no *tangible* chattels located outside of the state. The case is therefore not authoritative for the point on which it is cited; particularly in view of the fact that there is not even any discussion in the opinion of either the Supreme Court of Pennsylvania or the Supreme Court of the United States with reference to the point involved in the instant case.

In *Hartman's Estate*, 70 N. J. Eq., 664, the only point discussed or involved in the decision was whether Mrs. Hartman was a citizen of New York or New Jersey. It was held that she was a citizen of New Jersey, and that therefore New Jersey could tax on the theory of that being her domicile. There is nothing in the report of the case to indicate that there was any tangible personal property belonging to her located in New York, except that, as she is said to have owned a residence in New York in which she lived, one might perhaps infer that there was furniture in the house, and also infer

that the furniture was assessed for inheritance tax purposes. Likewise there is some reference to her having taken her horses and carriages to Long Branch in the State of New Jersey in the summer, but there is nothing to show whether she kept them in New York City or elsewhere in the winter. It is perfectly clear that there is nothing in the case to show that New Jersey did tax these New York tangibles; and it is also clear that no question was raised by counsel or considered by the court as to whether such tangibles, if they were assessed, were or were not taxable. The sole question, as we have stated above, discussed and decided by the New Jersey Court was whether her domicile was in New Jersey or in New York.

It is a general fundamental proposition, frequently laid down by this court, that the power to tax is correlative with the power to protect; that where a thing is situate outside the territory of the state, the sovereign has no power to protect and cannot tax it.

See *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S., 194, particularly Mr. Justice Brown's opinion, beginning at page 202.

Tappan vs. Merchants National Bank, 86 U. S., 490, particularly Mr. Chief Justice Waite's opinion at page 501.

These chattels located in the State of New York were entirely outside of the State of Pennsylvania and beyond its power to protect. How they should be dis-

posed of, as well as how they should be protected, was entirely within the jurisdiction of New York.

(c) The decision of the Supreme Court of Pennsylvania is founded upon the third proposition, which is:

That because the property which is being distributed in this proceeding is all in this state, there can be no Federal question involved. The proposition is thus stated by Mr. Justice Simpson (page 36, this book):

"It follows that as the right of transmission is State-created and hence the Commonwealth can legally say and does say, upon what terms this testator may give and his legatees may receive, property within her jurisdiction, for the reasons already specified, she may declare that the only basis upon which her conditions can be met, shall be by payment of a tax upon the value of the decedent's property wherever located."

Under this rule the State of Pennsylvania can levy upon the property which is within her jurisdiction a transfer tax which shall be based upon the value of decedent's property wherever situate, and that, of course, means upon real estate as well as upon tangible personal property. There is no more reason for excluding the one than the other.

This reasoning has all the charm of novelty. The Supreme Court of Pennsylvania relies for support of this conclusion on two decisions of this court. The first one is *Keeney vs. New York*, 222 U. S., 525, in which

Mr. Justice Simpson says the conclusion "is foreshadowed but not expressly decided." We are at a loss to see how it was foreshadowed by the opinion in the *Keeney case*, which we have quoted above, in which Mr. Justice Lamar says distinctly that *tangible* articles located outside the state of the domicile cannot be taxed.

The other case relied on is *Maxwell vs. Bugbee*, 250 U. S., 525, in which Mr. Justice Simpson says the question was fairly raised, and quotes from the opinion of this court as follows:

"When the state levies taxes within its authority ~~the~~ property ^{not} in itself taxable by the state may be used as a measure of the tax imposed."

It is apparent that the Supreme Court of Pennsylvania misapprehended the case this court had before it and the meaning of the language used. In *Maxwell vs. Bugbee* the questions raised was as to the inheritance tax upon *the estate of a non-resident*. The tax was levied with respect only to the local real and tangible personal property in the State of New Jersey, and with respect to stock of New Jersey corporations and national banks located in the State of New Jersey. The provision of the state tax law which was in question is the provision requiring the tax levied to bear the same ratio to the entire tax that would be imposed under the act if the decedent were a resident and all his property were located within the state as his property within the state bears to the entire estate wherever situate, specific devises or bequests of prop-

erty within the state being excluded from the computation.

The complaint of plaintiff in that case was that the act inflicted an unequal tax, which bore more heavily on the estates of non-residents than on the estates of residents. When one reads Justice Simpson's excerpt in connection with what follows it in Justice Day's opinion and in connection with Justice Day's references to authorities, it becomes clear that the excerpt does not support the proposition for which it is cited by the Supreme Court of Pennsylvania. Thus Justice Day says (page 539) :

"In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish."

The instant case involves no such question. It involves the proposition that the state of the domicile may add to that which is within its jurisdiction the value of that which is beyond its jurisdiction and then tax the whole. The Pennsylvania act does "really make the tax one upon property beyond its jurisdiction."

Again, this point involves the question of the meaning of the New York and Massachusetts statutes.

Undoubtedly the States of New York and Massachusetts have the power to decide what laws shall be

good to pass title to tangible chattels in those states and upon whom the title shall devolve; and we contend that they have done so.

For example, Section 17 of the *Decedents' Estate Law of the State of New York* (Book 13, *McKinney's New York Laws*, page 48), page 246 a, says that no person having a wife, child, husband or parent shall by his last will bequeath to charities more than one-half part of his estate, and that the bequests to charities shall be valid to the extent of one-half and no more. Mr. Frick left more than one-half of his estate to charities. Is his will good in New York in the face of this statutory provision?

The Supreme Court of Pennsylvania says that these provisions "relate, however, only to wills of testators there (in New York) domiciled." (See opinion, this book, page 38). The Court of Appeals of the State of New York has decided exactly the contrary, to wit, that it applies to property situate in New York of which a citizen of another state died seized. It has decided that if the bequest to charities made by the will of a citizen of New Jersey exceeds more than one-half of the net value of his entire estate, real or personal, wherever located, the charitable bequest as to all the property located in New York is void and the property goes to the heirs (*Decker vs. Vreeland*, 220 N. Y., 326). It is the law of New York that is going to decide who owns this Frick Collection; and if the question comes up, it will decide that Mr. Frick's will was valid in spite of this provision because his widow and children saw fit to ratify the bequest after his

death; and this is so because that is the law of the State of New York (*Amherst College vs. Ritch*, 151 N. Y., 282).

So too, there are many other statutes, both of New York and of Massachusetts, introduced into the record in this case which show that the validity and effect of Mr. Frick's will is to be determined by the laws of those states.

POINT II.

The State of Pennsylvania Has No Power to Levy a Transfer Inheritance Tax Based on a Valuation of the Estate Which Fails to Deduct the Paramount Taxes—The Paramount Liens Imposed by the United States and by the States Where the Property is Located.

Everyone must admit that the taxing power of the United States Government is supreme; therefore, all that was left of Mr. Frick's estate, the transfer of which the State of Pennsylvania could tax was the remainder after the Federal tax was paid.

Equally so, as Mr. Frick owned stock in the Atchison, Topeka & Santa Fe Railroad, a corporation of the State of Kansas, and the Pennsylvania executors could not get possession of, or exercise any dominion over, the shares until they had paid the Kansas inheritance transfer tax amounting to \$353,887.04, the State of Pennsylvania had no power to tax the estate on a valuation of this Atchison stock at its stock exchange quotation the day Mr. Frick died, disregarding the paramount lien of the State of Kansas. The same thing applies to all the "foreign" stocks.

Mr. Justice Frazer of the Supreme Court of Pennsylvania, in his dissenting opinion in this case, points out the reason why the State of Pennsylvania can-

not impose an estate tax upon the whole estate without deducting the Federal tax: because to do so does, in truth and fact, compel the residuary legatee to pay a tax upon the paramount tax which they have already paid to the Federal Government.

Justice Frazer says (this book page 48):

"If we concede the state tax is on the right to transmit the property and not on the property itself, still the total estate has been depleted by the amount of the federal tax and it is only the balance thus remaining decedent has a right to transfer and if the total estate is taken as the basis of the state tax, the effect is to give the state a revenue derived from a fund set aside for the benefit of the United States."

Mr. Justice Sweeney, in his dissenting opinion in *Hazard vs. Bliss*, 113 Atlantic, 469 (Rhode Island Supreme Court, May 4, 1921), expresses the same idea as follows:

"By operation of Federal law the net estate left by the decedent has been depleted by the amount of the tax and the deceased was deprived of the right to transfer so much of his net estate as would be required to pay the Federal Estate tax. The decedent had the right to dispose of only so much of his net estate as would be left after the deduction and payment of the Federal tax and the residuary legatee had the right to receive from the decedent only so much of his estate as would be left after the deduction and payment of the Federal Estate tax."

It is not necessary at this time to call the attention of this court to the long line of cases, beginning with *McCulloch vs. State of Maryland*, 17 U. S., 315, but we desire to mention *Flaherty vs. Hanson*, 215 U. S., 515, in which it was held that the requirement of a North Dakota statute, that the holder of a United States liquor license must record it in a certain manner in the State of North Dakota and pay a recording fee of \$25, was an invalid interference with the taxing power of the United States.

It seems to us that there is no escape from the proposition that when a state undertakes to levy an inheritance tax upon the full value of a decedent's property without deducting the paramount United States tax it assumes an increase in the amount of the estate which would pass from the decedent to his heirs equal to the amount of the Federal tax, and, consequently levies a tax upon the Federal tax.

Just so with reference to the paramount taxes which are imposed by other states and are liens upon stock of corporations of those states. We turn, for an example, to the Atchison stock held by Mr. Frick. The State of Kansas had upon that stock a paramount lien amounting to \$353,000, which attached at once upon Mr. Frick's death. It was just as much a lien upon the stock as if the stock had been pledged with a Kansas bank as collateral for a loan. The value of the stock to Mr. Frick's estate in Pennsylvania on the day he died could not be more than its market value on that day less the \$353,000 of paramount Kansas taxes. And when the State of Pennsylvania undertakes to disre-

gard the Kansas tax it really imposes an inheritance tax upon the Kansas tax.

The California court of last resort has reached a conclusion in direct antagonism to the Pennsylvania Supreme Court in the instant case: *Re Estate of Henry Miller*, 195 Pacific, 413 (1921). Mr. Justice Olney says at page 417:

"The authority of the state having actual control of the subject-matter, either because it is personal property within its limits, or because, as in this case, it is the stock of one of its corporations, is, of necessity, the superior. The state of the decedent's domicile can deal with the property only after the requirements of the state of its actual *situs* are satisfied. Putting it in another way and concretely, the stock of Henry Miller in the Nevada corporation comes into his California estate, there to be administered upon and taxed, only after the requirements of Nevada are complied with, and the only thing over which California secures authority is what remains after Nevada has taken its tax."

POINT III.

As in This Case, Under Mr. Frick's Will All Inheritance Taxes Are Thrown Upon the Residuary Estate, and as, Regardless of the Will, All Federal Estate Taxes Are by the Law Cast Upon the Residuary Estate, and as the Supreme Court of Pennsylvania Has Decided That This Is an Estate Tax and the Same Result Would Be Reached by the Pennsylvania Statute, It Is Contended that the Taxation of the Estate Passing to the Residuary Legatees, Without Deducting the Inheritance Taxes Paid Other States on Real Estate Located in Other States and the Transfer Taxes Paid the State of Pennsylvania on the General and Specific Legacies and Devises, Is Unconstitutional.

The question is, Can Pennsylvania not only tax the estate transferred, but also tax the taxes?

In the instant case, where the burden of all taxes is thrown upon the residuary legatees and directed to be paid out of the residuary estate, the Pennsylvania executors paid the inheritance taxes due other states on all the foreign real estate. The question is, Can the State of Pennsylvania make the residuary legatees pay a tax on the estate without a deduction of the

taxes paid on the foreign real estate? Using as an argument an illustration: Let us assume that a resident of Pennsylvania dies possessed only of foreign real estate. The heirs pay the tax in the foreign state upon the transfer of the real estate and go into possession. Under what power and by what process can the State of Pennsylvania collect a tax imposed upon the taxes paid to the foreign state? It is only from such estates as have other assets in Pennsylvania that the State of Pennsylvania may ever hope to collect such a tax. Does this give to estates that have assets in Pennsylvania the equal protection of the laws? Does not this statute essentially lack uniformity in that it collects from estates of residents a tax upon foreign assets where the estates have assets in Pennsylvania, and yet collects no tax from the estates of residents which consist entirely of foreign assets?

Under the same conditions the executors have paid the Pennsylvania inheritance taxes upon the portion of the estate devised to the general and specific legatees. But in arriving at the amount of the tax which must be paid under the terms of the will and the Pennsylvania statute by the residuary legatees, the taxing authorities have imposed a tax upon a fictitious residuary estate which is not in the hands of the executors for distribution by failing to deduct from the calculated residuary estate the taxes paid on the specific and general legacies and devises.

The Pennsylvania Act is somewhat peculiar. While the Supreme Court of Pennsylvania has said that the tax is an estate tax imposed upon the amount of the

whole estate, still under the terms of the act it is perfectly clear that executors have the right to deduct from the legacy of each legatee only the tax on the portion of the estate which he receives; whereas, in this case, by failing to deduct from their calculated unreal residuary estate the tax imposed upon the specific and general legacies, the taxing authorities have imposed upon the residuary legacies a tax upon the other taxes. To put it another way. You have here an act which in terms imposes upon the property received by the legatees a tax at specified rates based upon their relationship or lack of relationship to the decedent, whether such beneficiaries be general, specific or residuary legatees. The effect, however, of this adjudication is that the residuary legatees in this case are required to pay a tax on what they actually receive at a higher rate than residuary legatees in other estates pay; and this, not because of the provision in Mr. Frick's will requiring his executors to pay all the taxes out of the funds of the estate, which has the effect of imposing such taxes upon the residuary legatees, but because of the action of the taxing authorities in arbitrarily adding the amount of those taxes to the amount of money which the residuary legatees actually receive.

It is respectfully submitted that if the writ of error already granted is not the proper remedy in this case, the Federal questions involved are of such great and general importance, and there is such conflict and confusion between the decisions of state courts of last resort upon these points, that a writ of certiorari should be granted by your Honorable Court to the

end that there shall be an authoritative decision of the extent of the taxing power of the states and a proper adjudication of petitioner's rights under the United States Constitution and laws.

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